

Administrative Law Reform in the European Union: The ReNEUAL Project and its Basis in Comparative legal studies

Herwig C.H. Hofmann and Jens-Peter Schneider

The Research Network on European Union Administrative (ReNEUAL) model rules on European Union (EU) administrative procedure law, first published in 2014, are the result of a real-life, large-scale undertaking in comparative administrative law. The model rules were developed on the basis of comparative administrative law. The basis of comparison was, on one hand, administrative rules in various EU regulatory policy fields and, on the other hand, approaches to standard questions arising in administrative law contexts in European states. This chapter introduces the background and the outcome of the model rules on EU administrative procedure law.

1. The status quo in EU administrative law and the drafting of the ReNEUAL model rules

The ReNEUAL project sought ways to better realize constitutional values in EU public law, especially its provisions on administrative procedure. This objective resulted in a multi-annual research collaboration with mostly, but not exclusively, European specialists in national and European administrative law and constitutional law with backgrounds in different legal systems and linguistic approaches.

The first major ReNEUAL project was the ‘Model Rules on EU Administrative Procedure,’ first published online in September 2014. It presented in one document a set of innovative codifications of administrative procedures. Subsequent to a first on-line publication in English, the model rules have been translated and published (in chronologic order) in Spanish, Polish, German and Italian, with a French and a Romanian version ready for publication, and a Portuguese version in preparation. Given that the quality of a legal text might only reveal itself in the process of translation,

many points of the model rules have been revisited and re-discussed during the process of translation. Arguably, the ensuing discussions of how to understand and describe certain concepts often required the network to further clarify concepts. We will point out some of these elements in discussing the model rules. In addition,, the 2014 publication of the first version of the model rules received much thoughtful feed-back. Much of it was collected during a series of conferences presenting and discussing the model rules in various jurisdictions between 2014 and 2016.¹ At these conferences, where the model rules were studied from a national law perspective, they let to a fresh set of insights. Taking ideas and inspirations from these various translation processes and discussions an improved up-dated version of the model rules will be published in English version in 2017.

1.1. *The approach in light of the specific challenges in today's EU legal system*

The starting point of the project was an assessment undertaken by ReNEUAL working groups of the status quo in EU administrative law. This work analyzed EU rules on administrative procedures for the implementation of EU law, which were created in the context of generally fast-paced, dynamic legislative, regulatory processes and case law. EU administrative procedure law is, like much of EU law, often rather experimental in design. Examples for this include the emergence of the so called ‘comitology’ system and the evolution of EU agencies and their relations with Member State bodies. Another example of this dynamic and experimental approach is the use of information networks in EU administration as a flexible model to ensure de-centralized implementation of EU law while creating common rules for a single market. Also the mix of hard-law and soft-law instruments used in regulatory areas governed by EU law pair dynamic developments with experimentalist approaches. The existing body of rules and principles of EU administrative law has emerged principally from legislation and regulatory practice developed for specific policy areas. There is very little legislation applicable across policy areas. The bulk of the

¹ Conferences included specific events to discuss the translations of the model rules in Barcelona, Rome, Milan, Budapest, Leipzig, Cluj, Paris and Malmö.

overarching body of law governing administrative procedures in EU law is based on the case-law of the Court of Justice of the European Union (CJEU) in Luxembourg that develops and applies general principles of EU law.

The result of this approach is a significant fragmentation into sector-specific and issue-specific rules and procedures. Problems which are common throughout policy areas, and indeed Member States' legal systems, have been solved in different ways in each policy area. Solutions to common issues are thus reinvented on an ad hoc basis, irrespective of whether a policy-specific solution is warranted or not. Examples for this trend include: rights of and procedures for participation and hearings; inclusion of external expertise in decision-making; forms and formalities of decision-making; withdrawal and revocation of decisions; consequences of amendments, times and deadlines as well as consequences of procedural errors to name just a few.

The ReNEUAL model rules, however, are not predicated on the assumption that procedural heterogeneity is always undesirable. Nor are they premised on the assumption that one type of procedure is necessarily suitable for all types of cases. Nonetheless, in EU law, the diversity of solutions established without regard for an overarching, transversal concept has become overbearing. This, in turn, often results in unwarranted complexity, increasingly pronounced by the fact that the administrative procedural rules that pertain in any particular area will be an admixture of sector-specific legislation, complex case law, and administrative practice. Even within this dense normative framework, many issues of practical importance for administrators and affected individuals will not be clearly regulated.

The complexity arising from the diverse solutions opens regulatory gaps. These result from the fact that some procedural elements are addressed within policy-specific rules only partially, which means that often underspecified general principles of law must fill the void. Moreover, there is also a gap between, on one hand, the proliferation of new forms of administrative action in the EU and, on the other hand, their integration into a coherent system of protection. Examples for this can

be found in the expansion of so called ‘composite’ administrative procedures in EU law, i.e. procedures in which actors from various jurisdictions, both national and European, contribute to one single administrative procedure. These composite administrative procedures result in laws from multiple jurisdictions being applied in one single procedure that feed into one individual act adopted either by a Member State body or by an institution or agency of the EU. Composite procedures require joint gathering and use of information as the ‘raw material’ of de-centralized decision-making. In many policy areas, EU agencies facilitate cooperation by establishing shared databases for the collection and exchange of information. Composite procedures, often designed predominantly with view towards achieving efficiency and optimal use of pre-existing administrative resources, can run the risk of diminishing protection of individual rights and limit access to judicial review that could hold the diverse actors involved in a procedure to account. The absence of a systematic transversal approach is thus not just a formal problem. It is one of the main reasons why lacunae in the protection of procedural rights continue to exist.

The multi-jurisdictional nature of many if not most administrative procedures thus pose a particular challenges for EU administrative law. Despite ‘Europeanization’ of the policy areas, there is no fully fledged EU administration. Instead, implementation of EU law within the joint legal space is generally undertaken by national bodies that are in some cases supported by EU bodies. This distinguishes EU administrative law from many federal legal systems, which like Germany or the US follow a model of separating the implementing competences more clearly either according to levels (Germany) or according to policy competencies (USA). In contrast, the EU has developed an integrated, multi-jurisdictional approach, which in the absence of general rules of procedure, reinforces fragmentation between sector-specific procedures. The lack of general rules of procedure for EU institutions, bodies, offices and agencies, therefore, has a negative impact on the coherence of procedures in Member States’ authorities. This creates barriers to administrative coordination within Member States, not just between them.

EU administrative law however is also unique in that, on the EU's 'constitutional' level, Article 41 of the Charter of Fundamental Rights of the EU (CFR) contains a limited enumeration of some principles of 'good administration.' These are formulated as individual rights obliging EU institutions and bodies to provide fair, timely and reasoned decisions, opportunities to be heard prior to adverse individual decisions, and access to one's file as well as language rights. The core principles of good administration enumerated in Article 41 CFR are accompanied by rights of access to documents in Article 42 CFR and rights to an effective judicial remedy in Article 47 CFR. The latter has been interpreted by the case law of the CJEU to have repercussions for administrative procedures, for example, regarding the duty to give reasons and to grant a fair hearing prior to making decisions. Additionally, general principles of EU (administrative) law, as developed by the case law of the CJEU, have a broader scope than such binding and non-binding partial codifications, but are more abstract in nature. Using general principles of law, they fill voids in regulation within policy-specific rules.

One example is the right to a fair hearing. According to the case-law of the Court of Justice of the European Union (CJEU), an authority implementing EU law is bound by the EU general principle on the right to a fair hearing, even in cases where the legal basis which establishes the procedures to be followed by that authority does not oblige it to organize a hearing.² The general principles of EU administrative law as developed by the CJEU thus have a broader scope than specific legislation and can be applied to cover rights and obligations arising in the context of rulemaking, contracts, planning procedures, information exchange systems, and enforcement networks. Yet, reality shows that the development of general principles of EU administrative law through the gradually developing case-law of the CJEU is, in part, hampered by the limited standing-rights of individuals. This is especially true when it comes to administrative rulemaking, contracts, and information management activities. The existence of soft-law guidance on proper administrative

procedure provided by the European Ombudsman's Code of Good Administrative Practice and by the EU institutions' internal rules of procedure only partially mitigates this since this guidance is applied principally through review of administrative action by the European Ombudsman (EO).

1.2. *The Model Rules on EU Administrative Procedure*

The ReNEUAL model rules set out proposed accessible, functional, and transparent rules which make visible the rights and duties of individuals and administrations alike. The target audience for the model rules are, firstly, legislatures on the European and the national levels. To this end, the model rules are explicitly formulated to allow their use in future legislative projects. They are formulated in language that can be applied directly to a legislative text. The second target group are courts looking for a compilation of good standards to aid their review of procedural developments. Finally, the model rules are also designed to spur further academic debates in the various European legal systems and linguistic groups towards ensuring high standards and to foster an understanding for the specific challenges which European integration brings to the field of administrative law.

The ReNEUAL model rules comprise standard models for decision-making procedures, without limiting the possibility of modification for the needs of certain policy areas. The ReNEUAL model rules do not take aim at the dynamic, experimental nature of the EU's legal and political system. Instead, they are designed to support the maturing of the European legal order by providing 'building blocks' for decision-making procedures. These do not limit the possibility of further experimental developments in certain policy areas. They, instead, contribute to consolidating the lessons learned from past experimentalism and comparative approaches in the field of administrative law. The model rules are designed to function as *lex generalis* provisions. They cover the general questions of protection of rights in the design of effective decision-making procedures. Policy specific adaptations to these general rules are possible by legislation relating to specific matters.

The ReNEUAL model rules are organized in six parts referred to as 'books,' each specifying procedures leading to various outcomes of administrative procedures. They include the adoption and

implementation of binding decisions with identified addressees (single-case decision), binding acts of general application (rulemaking), binding agreements (contracts) or the handling of the collection and use of information as input into decision-making. ReNEUAL's model rules do not follow the same definition of the scope of applicability across the various books. Some specific considerations have to be taken into account, which lead to differentiation between the general scope of the model rules as reflected in Book I and the more specific scope of some of the other Books. Generally speaking, Books II (on rule-making), III (on individual decisions) and IV (on administrative contracts) are drafted for the EU institutions, bodies, offices and agencies, whereas Books V (mutual assistance) and VI (information management) have been drafted for Member States' authorities as well as EU authorities.

At this stage of development, the ReNEUAL model rules do not go further and actually articulate the nature of the consequences of non-compliance. The reasons are two-fold: First, while some national administrative procedure laws, indeed, include binding sanctions for non-compliance—such as annulment or damages—many others do not and are, nevertheless, enforced by courts in the way they deem most appropriate. Second, the EU courts have managed very well so far until now to impose appropriate sanctions for non-compliance with EU law. The choice that has been made in this version of the ReNEUAL model rules does not, however, mean that a codification of EU administrative procedure law should not in the future find an appropriate formulation of the sanctions to be applied in the event of non-compliance.

The process of drafting the ReNEUAL model rules follows an approach of 'innovative codification.' This involves bringing together in one document existing principles, which are scattered across different laws and regulations and in the case-law of courts. The process is 'innovative' in that the model rules modify existing principles and rules and add new ones where they were felt to be warranted by the drafting teams. This process began with consideration of the procedural rules currently prevailing in particular EU policy areas, which led to identification of a

preliminary version of possible procedural rules. The approach was to take a traditional ‘restatement’ approach and enlarge its ambit in view of the many areas which require innovative developments in the form of genuine ‘statements’ on how the law *de lege ferrata* should be (Bermann 2010).

2. *Comparative Studies as a core element of the ReNEUAL methodology*

To the readers of a book like this, it hardly needs to be mentioned that comparative administrative law has a long tradition reaching back to the early nineteenth century, which waned with the emergence of more state-centered, positivist approaches in the late nineteenth century and first half of the twentieth century (Huber 2014, 6). In Europe at least, the rise of post-Second-World-War European integration clearly propelled comparative administrative law back onto the agenda of judicial and legislative legal landscape.³

In the traditions developed through this process, the work of the ReNEUAL working and drafting groups was informed by two main objectives of comparative law. One is the concept of comparative law as the only real-life laboratory of legal concepts and constructs. The comparative method applied across legal systems and across policy areas in this sense widens the pool of concepts and uses the reality in other countries as arena for observation of workability and weaknesses of solutions (Schönberger 2011, 509). This was in part the approach used by the ReNEUAL drafters of the model rules.

Another, possibly more theoretical approach treats comparative law as a tool of comprehension and as a key to understanding the rationality and the functioning of different legal systems. This understanding of comparative administrative law was brought into the process of comparative research by mixed groups of researchers representing different legal traditions and systems. The diversity of the ReNEUAL team sought to ensure that this comparative element was covered by background as well as ensuring that each legal researcher was aware of differing legal concepts and sensitivities. The ReNEUAL model rules try to make this process transparent in the

³ One example is the case law of the early Court of Justice being concerned very clearly with a comparative approach. See e.g. case the case discussed to greater detail below Joined Cases 7/56 & 3–7/57 *Algeria and others v Common Assembly* [1957] ECR 39.

explanations and commentary added to the model rules, which explain the reasoning for the choice of one solution over another.

2.1. The comparative method as central element to the development of EU law by the Court of Justice of the European Union

The ReNEUAL approach to drafting the model rules on the basis of comparative law is not alien to EU law methodology as applied by the Court of Justice of the European Union (CJEU) in interpretation of the Treaties and acts of EU institutions. This comparative method is central to the recognition and interpretation of unwritten general principles of law. The recognition of and reliance on these principles has provided many of the basic elements of European administrative law, and it has often been central to the recognition of both procedural and substantive rights of individuals within the EU legal system (Hofmann et al 2011, 143; Tridimas 2006; Schwarze 2005, 193; Laenerts 2004; Bernitz and Nergelius 2000). A comparative approach is also a systemic reality within the CJEU which is composed of members representing all the legal traditions and systems found within the Union.

The use of the comparative method in the development of the case law of the CJEU law has two basic motivations. The first is using the comparative method as an approach to developing the EU ‘common law’ of administrative procedure, largely by elaborating on the general principles of law underlying the common constitutional traditions of the EU Member States. This approach was first developed in *Algera* and the subsequent case law of the CJEU regarding the European Coal and Steel Community (ECSC).⁴ These judgments laid down a number of the foundations of the administrative law system of the later EU. For example, in *Algera*, a case dealing with letters and communications by the Common Assembly, the Court ruled that these could constitute acts subject

⁴ See e.g. Case 4/54 *ISA v High Authority* [1954–56] ECR 91; Case 8/55 *Fédération charbonnière de Belgique v ECSC High Authority* [1954–56] ECR 245; Joined Cases 7/56 & 3–7/57 *Algera and others v Common Assembly* [1957] ECR 39; Case 9/56 *Meroni v ECSC High Authority* [1957–58] ECR 133; Case 10/56 *Meroni v ECSC High Authority* [1957–58] ECR 157; Joined Cases 43, 45, & 48/59 *Von Lachmüller v Commission* [1960] ECR 463; Case 105/75 *Giuffrida v Council* [1976] ECR 1395.

to judicial review as a consequence of their nature as ‘administrative measures,’ a translation from the French ‘*acte administrative*’ or the German ‘*Verwaltungsakt*,’ despite the different concepts behind the terminology in different legal systems.⁵ Later case law regarding the protection of fundamental constitutional rights such as *Stauder*⁶ and *Nold*⁷ confirmed this approach. In *Nold*, the Court stated that it was ‘bound to draw inspiration from the constitutional traditions common to the Member States’ and that it could not ‘therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.’⁸ In so holding, the CJEU underscored the ‘leitmotiv’ of the EU’s legal order as being embedded in the constitutional orders and traditions of the Member States giving expression to the notion of a common European constitutional space protecting its shared values through their expression in legal principles (Häberle 1991).

The second motivation for the comparative method is to obtain guidance from the various solutions adopted for a common legal problem in different legal systems, the inspiration for a methodology best suited to the objective of the Union based on the rule of law (Lenaerts 2003, 879). The various legal traditions thus compared and contrasted not only constitute the legal and philosophical background of the EU legal system but also amount to a pool of legal concepts, methods, and experience useful in solving genuine and current problems in the concrete application of abstract legal principles.

The approach of the CJEU to develop through the general principles of law a sort of ‘common law’ of EU administrative procedure is in some respects similar to that of US courts, where the federal courts have filled out the statutory requirements of the Administrative Procedure Act with an elaborate jurisprudence that implicates constitutional concerns (Metzger 2010). In that, one might even argue that the CJEU case law developing a common administrative law of the EU through

⁵ Joined Cases 7/56 & 3–7/57 *Algera and others v Common Assembly* [1957/58] ECR 39.

⁶ Case 29/69 *Stauder* [1969] ECR 419.

⁷ Case 4/73 *Nold v Commission* [1974] ECR 491.

⁸ Case 4/73 *Nold v Commission* [1974] ECR 491, para 13.

general principles of law has come much closer to the conceptual idea of a common law approach than that observed with regard to the US system (Donnelly 2007, 1105).

The comparative approach used in the ReNEUAL, nonetheless, differs from the methodological approach of comparative law applied by the CJEU for the interpretation and further development of EU law in one important aspect: The CJEU generally focusses, as shown above, more on comparing Member States' legal systems in search of solutions applicable to EU law, while at the same time only making very limited use of analogies and comparing solutions found in specific policies to the same problem. ReNEUAL, on the other hand, explicitly undertook a comparison between legal systems as well as a comparison between approaches developed within various policy areas subject to EU powers.

2.2. Comparative law influences from cross-policy sector review and national legislation as well as international legal provisions

Comparison of EU Member States with national law and the EU member States and non-EU countries are highly relevant. Rules for EU administrative procedures do not exist in a vacuum. Legal systems around the world face similar difficulties when it comes to organizing the administrative implementation of law. Especially during the last century, in line with the development of the 'administrative state,' many legal systems have turned to codification of administrative procedures. It was and is clear to the drafters of the ReNEUAL model rules on administrative procedure that the challenges to implementation of EU law and policy might in many cases be characterized by a greater complexity than the issues encountered within states when implementing their own national law, even in federally organized states. Nevertheless, although national codification experiences are not generally transferable one-to-one to the EU level, they do contain valuable case studies and inspiration to be taken into account when analyzing the possibilities of codifying EU administrative procedures. Therefore, the discussion within EU

member states on codifying administrative procedures - from first attempts to codification in Spain in 1889, to twentieth century codifications starting with the Austrian code of 1925, to the most recent example of the French code having entered into force on January 1st 2016 – are relevant on the EU level. In fact, many of the arguments used in the national jurisdictions pro and contra codification of administrative procedure codes are also repeated on the EU level.

Existing national codifications differ with regard to their applicability for different levels of government or to different aspects of administrative procedure, such as rule-making or adjudication. Differences regarding the levels of government are evident from looking at legislative powers at the regional level of government in, for example, Austria, Belgium, Germany, Italy and Spain, as well as, for certain parts of their territory, Finland, Portugal and the United Kingdom. But not all levels are necessarily covered by codifications of administrative procedure. Germany's federal code of administrative procedure is applicable to federal authorities. The laws of each *Land* are in turn applicable to the latter's authorities. These different codes are similar, representing a common and coherent legal and administrative culture. In Spain and in Italy, a single basic general law is applicable to central as well as regional and local levels of administration. However, certain regions and autonomous communities have the power to adopt complementary legislation. Further, the depth of regulation also differs across the national systems. The administrative procedure law of Italy, for example, is to a large extent built on principles to be fleshed out in specific policy legislation. The latter approach of a more restricted Italian codification has been also the guiding principle of the ReNEUAL drafters with the objective of achieving a short and workable draft as well as to ensure that the *lex generalis* nature of the model rules would be visible from the outset.

Further important differences between national codifications exist with regard to the administrative actions which are codified and the way they are defined. Many if not most administrative procedure acts in force within EU Member States apply only to unilateral administrative decisions (or adjudication). Some, such as the German law of 1976, also contain some

rudimentary rules applicable to contracts. Others, like the French code, understand public contracts as a specific case of administrative acts. National approaches also differ as to whether rulemaking is covered. In some Member States, like France, ‘administrative acts’ include regulatory acts (decrees, ministerial regulations, etc.), whereas in others they are whole separate types of act. Therefore, in France, the codification of administrative procedure generally also applies to the latter, while in other codes, it does not. This confirms that, although inspiration can be drawn from many of the EU Member States’ laws on administrative procedure, no one single model is transferable as such. In some cases, such as with regard to rule-making, non-EU legal systems like that of the US Administrative Procedure Act of 1946,⁹ have developed an extensive practice well worth taking into consideration.

Examples for comparative inspiration from public international law based instruments—often also referred to as ‘global administrative law’—include the 1977 Council of Europe resolution on the protection of individuals in relation to the acts of administrative authorities.¹⁰ Further, principles derived from the study of diverse regulatory regimes created under public international law show that general principles such as consultation and participation, access to information rights and reasoning are increasingly seen as central to the legitimacy of administrative action beyond the state. This is of course not surprising given the role that public international law enjoys as a source of EU administrative law. It is also not surprising given that the realms of public international law and administrative law are increasingly converging, in that many international agreements and organizations are directly concerned with administrative activities and tasks and the prerequisites. The legality and legitimacy of their actions therefore become increasingly similar to those expressed in traditional administrative law. On the other hand, the administrative law regimes of states, including those of EU Member States and of the Union itself, are becoming more and more

⁹ 5 U.S.C. 553 (2012).

¹⁰ Council of Europe, Resolution 77 (31) On the Protection of the Individuals in Relation to the Acts of Administrative Authorities (adopted by the Committee of Ministers on 28 September 1977 at the 275th meeting of the Ministers' Deputies). The resolution did not however use the term ‘good administration’.

internationalized. International organizations and their acts increasingly influence domestic (European or national) administrative practice and decision-making. Although international administrative cooperation itself demands a regulatory or constitutive framework, and the provision of such a framework has become one of the tasks of international administrative law, this dimension is awaiting further research by the ReNEUAL working groups to assess whether model rules addressing these aspects might be helpful at this stage of the development of the law.

3. Impact of comparative studies on the ReNEUAL model rules

According to the different forms of act addressed, each of the ReNEUAL model rules' books take into account a different set of comparative influences. Some areas draw more heavily on national experiences within EU member states and non-EU member states. Others draw more inspiration from a cross-policy-sector comparison. Again others are altogether more innovative given the architectural specificities of decision-making procedures. In the following we will try to highlight these different influences.

3.1. Book I (General Provisions)

Book I of the ReNEUAL model rules is rather short and consists of: a preamble assembling the most important (constitutional) principles of EU administrative procedure; four articles providing rules on the scope of application; rules on the relation of the model rules to either specific procedural rules of the EU or to Member State Law; and definitions relevant to more than one of the following books.

Comparative studies influence the scope of application of the rules only indirectly because national codification processes very clearly demonstrate that questions of scope are very often highly controversial (Schneider 2014, 208). This knowledge as well as early discussions with various high-ranking national judges led ReNEUAL generally to limit the scope of application to EU authorities.

National experiences with codifications of administrative procedure influenced also the *lex specialis* rule in Article I-2. Although such rules introduce the risk of de-codification, national examples show that such *lex specialis* rules are needed in order to provide flexibility to the administrative legal order (Schneider 2014, 213-214).

The influence of comparative studies on the definitions in Article I-4 is very limited with the exception of the definition of the term ‘administrative action,’ a term which is used in Article I-1(1) in combination with definitions in other books to define the applicability of the ReNEUAL model rules. The concept of administrative action as well as the substantive scope of application of the model rules is restricted to specific administrative activities. In this regard the model rules follow most national codifications within the EU¹¹ as the legislators refrain from imposing advanced procedural requirements on a broad and unlimited set of activities (Schneider 2016a: ##C.I.#).

3.2. Book II (*Administrative Rulemaking*)

Book II of the model rules addresses rulemaking procedures by the EU authorities acting in an executive capacity, that is, those that remain outside the formal legislative procedures provided for in EU law. The scope of the proposed rules is not limited to rulemaking by the Commission. It also includes the making of other non-legislative acts of general application by other EU institutions, bodies, offices, and agencies. The objective of the proposed procedural rules is to ensure that the constitutional principles of participatory democracy and transparency as well as principles of EU administrative law, in particular, the ‘duty of care’ (full and impartial assessment of all relevant facts) are observed in rulemaking procedures (Curtin et al. 2013).

In order to establish an innovative codification on administrative rulemaking the drafting team examined various sector-specific procedural regimes. According to this evaluation recent rulemaking frameworks like those for the European Aviation Safety Agency (EASA) or the

¹¹ §§ 56 ff. APA (Austria); Artt. L200-1 ff. APA/CRPA (France); § 9 APA (Germany); Artt. 2 ff. APA (Italy); Art. 1:3 APA/GALA (Netherlands); Artt. 104 ff. APA (Poland); Artt. 87 ff. APA (Spain); Sections 7 ff. APA (Sweden).

European Securities and Markets Authority (ESMA)¹² provide best-practice examples which inform for instance the rules of Book II on the initiation of rulemaking procedures, the preparation of draft rules, consultations, and the requirement of reasoned explanation.

In contrast, national experiences from EU Member States could not be used by the drafting team, as provisions on rulemaking are not a standard component of national codifications in the EU. However, the ReNEUAL team did explore experiences in non-EU jurisdictions, including US rules on executive rulemaking. With regard to US rules on rulemaking, US law – not unlike the provisions in Article II-4 – requires a ‘notice and comment’ procedure for draft rule-making. After in-depth analysis of the US scholarship on this matter, the drafting group of Book II concluded that the phenomenon of ‘ossification’—meaning agencies’ failure to update rules because of the intensive procedural and reason-giving requirements of the rulemaking procedure—was less due to rule-making procedures *per se* but more to specific rules on standing in court. Given the considerable differences between the judicial procedural rules of the US and the EU, the drawbacks of establishing formal procedural rules for rule-making appeared less relevant. Meanwhile, the benefits are considerable in terms of both the quality of rule-making and compliance with constitutional provisions strengthened under the Treaty of Lisbon. Well-designed codification of rule-making procedures can ensure improved rule-making procedures exists while protecting against an overly rigid approach which would lead to the blocking of rule-making initiatives.

3.3. Book III (*Single-Case Decision-Making*)

Book III is concerned with single-case decision-making, which is central to any regime of administrative procedure. Although only some national codifications of administrative procedure of EU member States regulate administrative rule-making, no codification of this kind neglects single-case decision-making. The general objective of Book III is to provide a clear set of rules applicable

¹² EASA-Regulation (EC) 216/2008; ESMA-Regulation (EU) 1095/2010.

to all stages of an administrative procedure preparing and adopting a single-case decision, from its initiation (Chapter 2), through the gathering of the relevant information (Chapter 3), particularly through hearings and consultations (Chapter 4) to the making of the final decision (Chapter 5) as well as rules on its potential rectification and withdrawal (Chapter 6). A characteristic of Book III in comparison to national codifications is the integration of several rules concerning so-called composite procedures which are a special feature of the EU administrative space and defined in Article I-4(4) (Schneider 2016a): **##C.III##**).

The influence of different forms of comparative study varies among the chapters and provisions of Book III. As already mentioned with regard to Book I, the substantive scope of application is determined by a rather restrictive and formal definition of ‘decision’ as the relevant administrative action for Book III (Article III-2(1)). This concept reflects similar approaches in national codifications (see above 3.1). In contrast, the definition of ‘party’ in Article III-2(3) and the general principles of fair decision-making laid down in Article III-3(1), are more or less influenced by Article 41 of the EU Charter of Fundamental Rights (CFR). But the more concrete rules in Article III-3(2)-(5) guaranteeing impartiality of decision-makers draw on examples from national codifications as well as from sector-specific EU law. An even broader mix of sources of inspiration has been used for Article III-4 on online information on existing procedures. In this case ReNEUAL has been inspired by the US APA and codifications of EU Member States as well as by EU secondary law or policy reports of EU officials.

Comparative legal studies of the various dimensions have therefore been intensively used in drafting Book III. The footnotes in the explanations to Book III indicate this clearly even if it was not possible to display all the material which has been used throughout the discussions. One can distinguish the following sources and areas of influence: The EU Charter of Fundamental Rights informed the rules on impartial investigation, on access to the file and the right to be heard, and concerning the use of languages. Other relevant provisions of EU primary law are Art. 296(2) TFEU

concerning the duty to give reasons and Art. 297(2) TFEU concerning form and notification of decisions. Secondary EU law has been a major source of inspiration with regard to the rules on investigation by request or by mandatory decision, the article establishing duties to cooperate of parties, the section on inspections, and the article concerning the consultation of the interested public. The jurisprudence of the CJEU has been relevant for the drafting of the rules codifying the duty of care, the privilege against self-incrimination and the legal professional privilege, the provision on access to the file and the right to be heard, and the chapter on rectification and withdrawal of decisions. National law of EU Member States has influenced the provisions concerning the responsible official, the principle of investigation as well as the articles concerning the consultation of the interested public, the duty to specify the decision, the duty to indicate available remedies, the use of electronic forms, the notification of a decision, the correction of obvious inaccuracies, and specific features with regard to the withdrawal of legal decisions that are beneficial. Additional sources of inspiration are the European Code of Good Administrative Behavior drafted by the European Ombudsman and Recommendations of Council of Europe.

3.4. Book IV (Contracts)

Book IV regulates administrative procedures leading to the conclusion of a public contract as well as procedures governing the execution or termination of such contracts. Book IV does not regulate the substantive law of obligation. Only contracts regarding administrative activities concluded by EU authorities fall within the scope of Book IV.

The drafting team of Book IV faced several challenges. First, the team had to screen an abundant amount of restatement material (including standard contracts and contract templates developed by the Commission), which is very ambiguous and fragmentary in nature. Second, there is no consensus among lawyers on how to understand this material. Thus, a very heterogeneous landscape already exists at the European level. Third, this landscape becomes even more complex

when the national level is taken into account. The national concepts of public contracts (and public contract law) differ considerably – regardless of whether these contracts are governed by national public or national private law, or by a mixture comprising public and private law elements.

Like Book III, Book IV is influenced by a variety of sources. Sectoral EU law has been especially influential with regard to the section on the competitive award procedure (Art. IV-9 to Art. IV-19). This important element of Book IV is inspired by the Commission Communication on contract awards¹³ as well as by Title V of the EU Financial Regulation 966/2012 and by Title V of the respective implementing Regulation 1268/2012. Several other rules either codify existing CJEU jurisprudence or propose solutions to problems arising from this case law. Particularly interesting is Book IV's effort to distinguish the authority's decision to enter a contract (first level legal act) from the contract itself (second level legal act), which is derived from the CJEU jurisprudence. This jurisprudence, for its part, follows the French public contract model (Rennert 2016, ##15##). Thus, national public contract law inspires the ReNEUAL model rules indirectly through the CJEU jurisprudence. Nevertheless, the ReNEUAL model rules do not follow the pure French model, but, rather, the model rules modify it with regard to the contractual consequences (i.e. on the second legal level) of legal defects of the decision on the first legal level. The French public contract law empowers the courts to modify the contract, but the ReNEUAL model rules prefer an innovative approach of obligations for the contracting parties to renegotiate the contract (Rennert 2016: ##19f##). Another source of inspiration, especially relevant for Chapter 4 of Book IV dealing with subcontracts, has been findings of the European Ombudsman, the so-called 'ombudsprudence.' Finally, in Book IV the drafting team used the wording of the Draft Common Frame of Reference

¹³ Commission Interpretative Communication on contract awards not subject to the provisions of the Public Procurement directives (2006/C 179/02).

(DCFR), an equivalent to the ReNEUAL project in the field of European private law for a limited number of rules.¹⁴ In other cases the ReNEUAL model rules differ explicitly from the DCFR.

3.5. *Book V (Mutual Assistance) and Book VI (Administrative Information Management)*

Mutual assistance and administrative information management constitute important parts of European administrative law because EU law is implemented mostly by various Member State authorities. The persons and enterprises regulated by these authorities engage in cross-border activities using the fundamental freedoms within the Single Market as enshrined in the EU treaties. However, national authorities are, with very few exceptions, still bound by the principle of the territorial limits of public authority. Thus, supervision of cross-border movements of goods, services, workers or capital depends on cooperation between the respective national authorities. This horizontal cooperation is complemented by vertical cooperation if central EU agencies provide information or expertise to competent Member State authorities. Moreover, national authorities support the EU authorities that directly implement EU law if they need local knowledge or national enforcement powers.

Today, no general legislation provides a clear procedure for cross-border or multi-level mutual assistance. Instead, EU and Member State Authorities rely either on divergent sector-specific rules or on conventions of the Council of Europe. Book V of the ReNEUAL model rules establishes mutual assistance between public authorities as a generally applicable default obligation. Its detailed rules about the duties of either the requesting authority or the authority whose cooperation is requested, the grounds for refusal of a request, the right of a person concerned to be informed, and the allocation of costs are directly applicable to all fields of EU law as long as no more advanced forms of inter-administrative cooperation are applicable. Consequently, the rules of Book V provide a minimum standard for mutual assistance.

¹⁴ Study Group on a European Civil Code and the Research Group on EC Private Law Principle Definitions and Model Rules of Administrative Law (2009), http://ec.europa.eu/justice/policies/civil/docs/dcf_r_outline_edition_en.pdf (accessed 18 September 2016).

Book V is inspired to a great extent by conventions of the Council of Europe, especially the European Convention No. 100 of 1978 on the obtaining abroad of information and evidence in administrative matters. One reason for this is that this convention today closes the existing gap in EU law as mentioned above. Thus, it reflects the state of play. In addition, Convention No. 100 is a general instrument while most other international conventions or relevant supranational instruments of EU law are of a more sector-specific nature like tax law, customs law, or internal market law. In contrast to Books III and IV, national codifications of administrative procedure are not a source of inspiration explicitly mentioned in the explanations to Book V. The reason is the rather divergent state of play in national legal orders. In many member States no general provisions on mutual assistance seem to exist.¹⁵ A few Member States possess comprehensive general rules on mutual assistance, which are either integrated into their codifications of administrative procedure¹⁶ or outsourced to supplementary acts.¹⁷ A number of other states rely on very short provisions either within their procedural codifications¹⁸ or in their constitutions¹⁹ obliging authorities to provide mutual assistance without any further guidance.

Book VI supplements Book V (and Book III) by regulating advanced forms of inter-administrative information exchange which are central features of information networks within the composite European administration (Galetta et al., 2014 65). Thus Book VI combines a general codification with pre-structured, but flexible rules in order to allow for adaptations to the specific needs of a sectorial information exchange. Book VI is probably the most innovative Book of the ReNEUAL model rules because the drafting team could not rely on national codifications as a model. Consequently, the drafters had to compare and analyze a wide range of sector-specific and often very recent material of EU law in order to develop the classification mentioned above and to

¹⁵ Important examples in this regard are France, Italy and the United Kingdom.

¹⁶ See for example §§ 4-8 APA (Germany); Art. 4(5), 34-37 APA (Lithuania).

¹⁷ Estonian Administrative Cooperation Act.

¹⁸ See for example Section 6 APA (Sweden); Section 10 APA (Finland); see also Art. 4 APA (Spain; Act 30/1992) which will be replaced in 2016 by Art. 140-142 of Act 40/2015.

¹⁹ See Art. 22 of the Austrian Constitution.

identify best-practice solutions to the legal problems arising from advanced information exchange within horizontal and vertical administrative information networks in the EU (Schneider 2016b).

4. Impact of the ReNEUAL model rules on the development of administrative law in the EU and at national level

Two recent drafting processes of administrative procedure at EU as well as at national level have been particularly influenced by the ReNEUAL model rules.

On the EU level the European Parliament has been most active in promoting an administrative procedure act in the form of EU legislation. A resolution of January 15th, 2013 called for a codification of general principles of administrative procedural law. The European Commission, which is in charge of initiating legislative procedures, adopted a rather cautious position and refrained from drafting a proposal for a European administrative law. However, the European Parliament provided for the first time in its history a draft regulation on its own. This draft was endorsed by the Parliament in June 2016²⁰. Several ReNEUAL members were invited by the European Parliament to provide expertise to the Parliament's drafting team. In line with the ReNEUAL findings, the Parliament found that the existing fragmentation of administrative procedure law was due to an increase in sector-specific legislation and the subsequent differentiated jurisprudence of the CJEU. Nonetheless, in view of the near revolutionary act of the European Parliament to itself draft an act, much political compromise had to be made and the European Parliament chose to be very selective regarding the content. In view of this, the Parliament's draft, although heavily influenced by the ReNEUAL model rules, applies a more restricted approach by concentrating on single-case decision making and does not include model rules for composite procedures. It also differs from the ReNEUAL approach of a clearly defined scope of application concerning the administrative actions covered by its draft (Schneider (2016c): ##).

²⁰ Resolution for an open, efficient and independent European Union administration (2016/2610(RSP)) B8-0685/2016.

On the Member State level, the most recent codification is that of France, the ‘*Code des relations entre le public et l’administration*’ which entered into force on January 1st, 2016 (see Custos in this volume). The influence of the ReNEUAL project on the drafting of the new French code on administrative procedures may be assessed by reference to both the start of the drafting process and its result. The drafting of the Code clearly intended to draw inspiration from comparative and European law (Violettes and Barrois de Sarigny 2014). This intention had a tangible impact on the composition of the group of experts nominated by the French government to advise on the drafting of the code. This ‘*cercle d’experts*’, composed of about 20 individuals with academic, judicial, or administrative backgrounds, included two prominent members of the ReNEUAL project amongst the only six academic members of the advisory committee. The resulting code shows some limited influence of the ReNEUAL model code. Limitations stem, on one hand, from the very different context of a multi-level integrated administrative structure in the EU by comparison to the situation within the unitary French state. Further, the new French code is not structured according to the various types of administrative activity (as is the case in the ReNEUAL model rules) but rather according to the various types of relations between the administration and the citizens. However, there are undeniable common elements in the approaches underlying the French Code and the ReNEUAL model rules, as well recognition of debates undertaken in the EU Members States. The process is a typical example of the ongoing export of concepts from the national to the European level and the subsequent re-importation of concepts as evolved by the European approach.

5. Conclusions

The ReNEUAL model rules are the outcome of a large-scale undertaking in comparative administrative law. The sources of inspiration consist of: primary (constitutional) and secondary (legislative) EU law; the case-law of the CJEU, the practice of EU institutions, bodies, offices, and agencies; the comparative law of the EU Member States; and other relevant national and international experiences of full or partial codification of administrative procedure. Furthermore,

some proposed rules are the result of studies of the so-called ‘ombudsprudence’ of the EO and especially the proposals frequently added to EO reports.

The comparative law element was used both to identify problematic aspects of the law of the European Union which have been solved by Member State legal systems and to isolate approaches already addressed in some policy areas of Union law but not others. For both, the comparative point of view is decisive. The use of comparative (administrative) law is not an alien element in EU law. In fact, the very origins of EU administrative law have consisted of finding principles of law applicable to the EU legal system by comparison between EU Member State legal systems and approaches. Further, the experimental nature of many policy developments in EU law imply that a great diversity of solutions exists. The comparative method allows for taking stock and analyzing what has worked better and whether and in what conditions a more generalizable application would be possible. The normative criteria in assessing various principles are drawn from the constitutional framework of the Union.

In this context, the influence of different forms of comparative studies varies among the different books of the ReNEUAL model rules. These books concern general provisions especially with regard to the scope of application and the relation to sector-specific law (Book I), administrative rulemaking (Book II), single case decision-making (Book III), contracts (Book IV), mutual assistance (Book V), and information management (Book VI). Some of these forms of administrative action are not covered by either national law or by certain sources of EU law. Accordingly, the drafting teams could not rely for all books on the same material. In addition, national law does not reflect the specifics of composite procedures which are a core element of EU law, while some provisions of sector-specific EU law are not adequate for a general codification. However, choices between different legal solutions had to be made in some cases. ReNEUAL did not limit itself to a comparative and evaluative method, such as the economic analysis of law in positive political theory. Instead, the drafting teams composed of experts from various backgrounds have taken into account

the constitutional principles relevant for administrative law enshrined in the EU treaties as well as the promotion of administrative efficiency and legal effectiveness. The balancing of these arguments has been influenced by the various discussion fora established within ReNEUAL as well as with stakeholders, other academics, and legal practitioners.

Whether the EU legislature or the legislatures of the EU Member States endorse fully, partially or for some policy-specific legislation the ReNEUAL's proposals is of course part of their legislative discretion. From this perspective it is promising that the European Parliament voted in June 2016 in favor of a resolution accompanied by a fully-fledged draft regulation for an open, efficient and independent European Union administration. The parliamentary draft does not integrate all books of the ReNEUAL model rules in order to concentrate on the most important problems of single-case decision-making by EU authorities. Such an initiative is a clear indication that the European Parliament is aware of the fact that the recently questioned legitimacy and democratic accountability of the European administration will be enhanced by a codification reflecting and highlighting constitutional principles of administrative procedure. It remains to be seen whether the other legislative bodies of the EU follow the European Parliament in this regard.

References

- Bermann, G. A. (2010), 'A restatement of European administrative law: Problems and prospects,' in Susan Rose-Ackerman, Peter L. Lindseth (eds.), *Comparative Administrative Law*, Cheltenham, UK:Elgar Publishing, pp. 595-605.
- Bernitz, Ulf and Nergelius, Joakim (eds.) (2000), *General Principles of European Community Law*, The Hague: Kluwer.
- Curtin, Deirdre et al. (2013), 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda,' 19 *European Law Journal* 19, 1-21.

- Donnelly, C.M. (2007), '*Les rapports entre droit administratif fédéral et droits administratifs des états aux États-Unis: Comparaison avec l'Union Européenne*,' in Jean-Bernard Auby and Dutheil de la Rochère (eds.), *Droit Administratif Européen*, Brussels:, pp. 1085-1110.
- Galetta, Diana-Urania et al. (2014), 'Information Exchange in the European Administrative Union – An Introduction,' *European Public Law* 20, 65-70.
- Häberle, Peter (1991), 'Gemeineuropäisches Verfassungsrecht,' *Europäische Grundrechte Zeitschrift* 18, 261–74.
- Hofmann, Herwig C.H. et al. (2011), *Administrative Law and Policy of the European Union*, Oxford: Oxford University Press 2011.
- Hofmann, Herwig C.H. et al. (2014) (eds.), *ReNEUAL 1.0: ReNEUAL Model Rules on EU Administrative Procedure*, <http://www.reneual.eu/index.php/projects-and-publications/reneual-1-0>, last visited 18 September 2016.
- Huber, P.M. (2014), Grundzüge des Verwaltungsrechts in Europa, in Armin von Bogdandy et al. (eds.), *Handbuch Ius Publicum Europaeum* Vol. 5, Munich: C.F. Müller Verlag, pp. 6-72.
- Lenaerts, Koen (2003), 'Interlocking Legal Orders in the European Union and Comparative Law', *International and Comparative Law Quarterly* 52(4), 873–906.
- Lenaerts, Koen (2004), 'In the Union we Trust: Trust-Enhancing Principles of Community Law,' *Common Market Law Review*, 41(2), 317–343.
- Metzger, Gillian (2010), 'Ordinary Administrative Law as Constitutional Common Law,' *Columbia Law Review* 110, 479-536.
- Rennert, Klaus (2016), (TITLE?) in Jens-Peter Schneider (eds.), *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrenrecht – Tagungsband*, Munich: Beck 2016 (forthcoming).
- Schneider, Jens-Peter (2014): 'Germany,' in Jean-Bernard Auby (ed.), *Codification of Administrative Procedure*, Brussels:Bruylant2014, pp. 203-226.

- Schneider, J.-P. (2016a): 'The ReNEUAL codification project: Book III,' in Matthias Ruffert (ed.), *The Model Rules on EU Administrative Procedures: Adjudication*, Groningen: Europa Law Publishing Groningen, pp. 1-15.
- Schneider, J.-P.(2016b), 'Information exchange and its problems,' in Carol Harlow et al. (eds.), *Research Handbook on EU Administrative Law*, Cheltenham: Edward Elgar (forthcoming).
- Schneider, J.-P. (2016c), 'Einzelfallentscheidungsverfahren als Gegenstand von Buch III des ReNEUAL-Musterentwurfs,' in: Jens-Peter Schneider et al. (eds), *ReNEUAL-Musterentwurf für ein EU-Verwaltungsverfahrensrecht – Tagungsband*, Munich: Beck (forthcoming).
- Schönberger, C. (2011), 'Verwaltungsrechtsvergleichung,' in Armin von Bogdandy (eds.), *Handbuch Ius Publicum Europaeum* Vol. IV, Munich: C.F. Müller Verlag München, pp. 493-540.
- Schwarze (2005), Jürgen *Europäisches Verwaltungsrecht* (2nd ed.), Baden-Baden: Nomos, 2005.
- Tridimas, Takis (2006), *The General Principles of EC Law* (2nd ed). Oxford: Oxford University Press.
- Vialettes, Maud and Barrois de Sarigny, Cécile (2014), 'Le projet d'un code des relations entre le public et les administrations,' *AJDA* [full journal title] [volume(issue)] 402-end page.